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ROBERT LEE & ANOR

v.

WONG AH YAP & ANOR

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FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ARIFIN ZAKARIA FCJ
AUGUSTINE PAUL FCJ
[CIVIL APPEAL NO: 02-6-2006 (M)]

C

11 MAY 2007

LAND LAW: *Acquisition of land - Compulsory acquisition by state government - Whether prohibition in Malacca Lands Customary Rights Ordinance (Cap. 125) still applies to decide to whom compensation should*

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be paid - Whether doctrine of fairness could override principles of law and Malacca Lands Customary Rights Ordinance (Cap. 125) - Malacca Lands Customary Rights Ordinance (Cap. 125), ss. 3, 29

LAND LAW: *Customary land - Compulsory acquisition by state government - Whether prohibition in Malacca Lands Customary Rights*

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Ordinance (Cap. 125) still applies to decide to whom compensation should be paid - Whether doctrine of fairness could override principles of law and Malacca Lands Customary Rights Ordinance (Cap. 125) - Malacca Lands Customary Rights Ordinance (Cap. 125), ss. 3, 29

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LAND LAW: *Acquisition of land - Compensation - Compulsory acquisition by state government - Whether prohibition in Malacca Lands Customary Rights Ordinance (Cap. 125) still applies to decide to whom compensation should be paid - Whether doctrine of fairness could override principles of law and Malacca Lands Customary Rights Ordinance (Cap.*

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125) - Malacca Lands Customary Rights Ordinance (Cap. 125), ss. 3, 29

This appeal concerned a dispute regarding the entitlement to the sum of RM616,146 that was awarded as compensation for the

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acquisition by the State of a piece of MCL land in Malacca. The High Court gave judgment for the plaintiffs/respondents, with the subsequent appeal by the defendants/appellants being dismissed by the Court of Appeal. The appellants were granted leave to appeal to this court on the following two questions: (i) when land under

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the Malacca Lands Customary Rights Ordinance (Cap. 125) ('Ordinance') has been compulsorily acquired by the Government

under the Land Acquisition Act 1960, whether the prohibition in the Ordinance still applies to decide to whom the compensation shall be paid; and (ii) whether the doctrine of fairness can be used to override the principles of law and the Ordinance. The MCL land was held under the Ordinance, which stipulated that only a Malay domiciled in Malacca or a person holding a certificate from the Governor-in-Council of Malacca is qualified to hold MCL land, and no transfer of MCL land "shall be valid unless it is made to an individual qualified to become a customary land-holder". The registered owner of the MCL land was one Lee Chim Giang ('Lee') as the executor of the estate of one Li Keng Liat ('Li'), who died in 1903. Lee had also passed away and the present appellants were the current executors of the estate of Li, deceased. In 1935, one Tan Tai Tip ('Tan'), also since deceased, "purchased" the MCL land from Lee, who was then the executor of Li's estate. Tan was not a Malay or a person issued with a certificate by the Governor-in-Council to hold or to own the MCL land; in short, he was not a person qualified for MCL land to be sold and transferred to, which explained why the land remained registered in the name of Lee, deceased. In this action, the estate of Tan, deceased, was represented by its administrators, who were the plaintiffs. After the acquisition of the MCL land, the Collector of Land Revenue, Malacca made an award containing different compensations to various people. However, the only dispute in this appeal concerned the award made to "tuan tanah" (the land owner), which consequently brought up the issue of who was really the "tuan tanah" in this case.

Held (allowing the appeal)
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

(1) There was no difficulty accepting that there was a sale; the question was whether it was valid or void. This issue had in fact been decided by the Supreme Court in *Pang Cheng Lim v. Bong Kim Teck & Ors*. In that case, the MCL lands were previously registered in the plaintiff's mother's name. The Court held that since she was not a Malay, she must have been issued with a certificate under s. 104 of the National Land Code (Penang And Malacca Titles) Act 1963 in respect of the said lands. Otherwise, she would not have been registered as the proprietor of the lands. She was a

"certificated person" under the 1963 Act in respect of the lands; she was a customary land-holder. Her position was similar to that of Lee in the instant appeal, except that Lee was registered as an executor, which did not make any difference legally. They were both registered proprietors, one as a customary land-holder and the other as an executor. The pertinent point was that the alleged purchase by the defendant's mother in that case, who was neither a Malay nor a certified person, was held to be invalid. Similarly in the instant appeal, the alleged purchase by Tan (also not a Malay) must, on the same ground, be held to be invalid. (paras 21, 22, 23, 24 & 29)

(2) In the instant appeal, the alleged sale happened in 1935. The "purchase price" was paid, possession was given, both parties had long died and no attempt whatsoever was made for Tan to be issued with a certificate of the Governor-in-Council. In the circumstances, the sale could not be conditional; this was a case of an outright sale (*Foo Say Lee v. Ooi Heng Wai* (dist)). So, it was not necessary to consider whether the provisions of s. 3 of the Ordinance allowed a conditional sale. (paras 39 & 40)

(3) The High Court and the Court of Appeal appeared to be of the view that the right to compensation was a different issue from the issue of ownership of the land. That, with respect, was missing the issue: the compensation in issue was for the "tuan tanah", the occupiers having been paid, separately. To hold that the plaintiffs were entitled to the compensation was to recognize Tan's ownership right, if not in law, in equity, which in turn meant recognizing the "sale" as having passed the interest in the land to a purchaser. To say that property passes even if the sale is invalid and unenforceable is to defeat completely the purpose of the creation of MCL and the Malay Reserve lands. That is the effect. In the circumstances, the first question would be answered in the affirmative. (paras 42, 43, 44, 45 & 46)

(4) The Ordinance and the Malay Reserve Enactments are laws made with a definite objective. No rules of equity (or common law) should be applied that would defeat such objective. What more, when it is to give effect to a transaction declared to be invalid by the statute. Unfortunately, quite often, equitable

rules have been applied without considering the restrictions imposed by statute (Civil Law Act 1956). Not only that, but the application of the rules have, consciously or unconsciously, been extended to situations beyond the original or earlier situations, which leads to even greater injustice. (paras 52 & 53)

(5) In this case, it was not just the issue of which is more fair, to decide in favour of the plaintiffs or the defendants. Here, there was an act of two persons that contravened the written law and which, if given effect to, would defeat the whole purpose of the written law. In such a situation, the rules of equity should not be applied. In fact, the Court of Appeal was reluctant to use the term "propriety estoppel". What was left was nothing more that some vague rules of fairness. Here again, the "fairness" was only as between the two parties who contracted contrary to the provisions of the written law and to the detriment of the class of people that the law sought to protect. The bigger picture must not be missed. It is true that the courts, through its decisions, try to arrive at a "fair and just" result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. In this case, the law protecting the ownership of Malays over some areas of land was enacted by legislature as a matter of policy and it is preserved by the Constitution. If at all it should be repealed or amended, let it be decided, as a matter of policy, by the legislature, not the court through its decision. The fact that the land had been acquired by the State and would be used for residential purposes made no difference. The land remains a Customary Land until the State Authority decides to declare it, or part of it, otherwise. That again is a matter of policy. In the circumstances, the second question would be answered in the negative. (paras 57, 58, 59, 60, 61 & 62)

Bahasa Malaysia *translation of headnotes*

Rayuan di sini melibatkan pertikaian mengenai keberhakan kepada wang berjumlah RM616,146 yang diaward oleh Kerajaan Negeri sebagai pampasan kerana mengambil sebidang tanah MCL di Melaka. Mahkamah Tinggi memberi keputusan yang berpihak kepada plaintif/responden, sementara Mahkamah Rayuan pula menolak rayuan oleh defendan/perayu. Berikutnya, perayu diberi kebenaran untuk merayu ke mahkamah ini atas dua soalan berikut:

A (i) apabila tanah yang tertakluk kepada Ordinan Hak Tanah Adat Melaka (Cap. 125) ('Ordinan') telah diambil oleh Kerajaan di bawah Akta Pengambilan Tanah 1960, adakah larangan di dalam Ordinan terpakai dalam menentukan kepada siapa pampasan perlu dibayar; dan (ii) sama ada doktrin kesaksamaan boleh digunapakai B bagi mengambilalih prinsip undang-undang dan Ordinan. Tanah MCL dipegang di bawah Ordinan, yang memperuntukkan bahawa hanya seorang Melayu yang berdomisil di Melaka atau seorang yang memegang sijil dari Gabenor Melaka layak untuk memegangnya, dan tiada pindahmilik tanah MCL "boleh menjadi C sah kecuali jika dibuat kepada seorang yang layak menjadi pemegang tanah adat". Pemilik berdaftar tanah MCL adalah seorang Lee Chim Giang ('Lee') sebagai wasi pusaka seorang Li Keng Liat ('Li'), yang meninggal dunia pada 1903. Lee juga telah meninggal dunia dan perayu-perayu di sini adalah wasi-wasi semasa D pusaka Li, si mati. Pada tahun 1935, seorang Tan Tai Tip ('Tan'), juga telah meninggal dunia, "membeli" tanah MCL tersebut dari Lee, yang pada waktu itu adalah wasi pusaka Li. Tan bukan seorang orang Melayu ataupun seorang yang diberi sijil oleh Gabenor Melaka untuk memegang atau memiliki tanah MCL; E dengan kata lain, beliau bukan orang yang layak untuk dijual atau dipindahmilikkan tanah, dan inilah sebabnya mengapa tanah masih terdaftar atas nama Lee, si mati. Dalam tindakan di sini, pusaka Tan, si mati, diwakili oleh pentadbir-pentadbirnya, adalah plaintif-plaintif. Selepas pengambilan tanah MCL, Pemungut Hasil Tanah, F Melaka membuat award membahagikan pampasan kepada beberapa orang. Apapun, satu isu berbangkit mengenai award yang dibuat kepada "tuan tanah", yang membangkitkan pula persoalan siapakah sebenarnya "tuan tanah" itu.

G **Diputuskan (membenarkan rayuan)**
Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

(1) Tiada masaalah untuk menerima bahawa penjualan memang wujud; soalnya adakah ianya sah atau tidak. Isu ini H sebenarnya telah diputuskan oleh Mahkamah Agong di dalam *Pang Cheng Lim v. Bong Kim Teck & Ors*. Dalam kes itu, tanah-tanah MCL asalnya didaftar atas nama ibu plaintif. Mahkamah memutuskan bahawa oleh kerana beliau bukan seorang orang Melayu, beliau seharusnya telah diberikan sijil di I bawah s. 104 Akta Kanun Tanah Negara (Hakmilik Penang dan Melaka) 1963 berhubung tanah-tanah tersebut. Jika tidak,

beliau tidak mungkin didaftarkan sebagai pemilik tanah. Beliau adalah "orang yang disahkan layak" di bawah Akta 1963 berhubung tanah-tanah; beliau adalah pemegang tanah adat. Kedudukan beliau adalah sama seperti kedudukan Lee dalam rayuan ini, kecuali bahawa Lee didaftar sebagai seorang wasi, yang mana ianya tidak ada beza di sisi undang-undang. Kedua-dua mereka adalah pemilik-pemilik berdaftar, seorang sebagai pemegang tanah adat sementara seorang lagi sebagai wasi. Apapun, pokok pangkalnya, dalam kes tersebut, pembelian oleh ibu defendan, yang bukan seorang orang Melayu ataupun seorang yang layak, telah diputuskan sebagai tak sah. Oleh itu, dalam rayuan semasa, pembelian oleh Tan (yang bukan seorang orang Melayu) harus juga diputuskan tak sah berdasarkan alasan yang sama.

(2) Dalam rayuan semasa, jualan yang dikatakan berlaku pada tahun 1935. "Harga belian" telah dibayar, milikan telah diserah, kedua-dua pihak telah lama meninggal dan tiada apa-apa cubaan dibuat supaya Tan diberikan sijil Gabenor Melaka. Dalam keadaan sedemikian, penjualan tidak boleh menjadi penjualan bersyarat; ini adalah suatu kes penjualan lepas (*Foo Say Lee v. Ooi Heng Wai* (dibezakan)). Oleh itu, adalah tidak perlu untuk menimbang sama ada peruntukan s. 3 Ordinan membenarkan penjualan bersyarat.

(3) Mahkamah Tinggi dan Mahkamah Rayuan kelihatannya berpendapat bahawa hak kepada pampasan adalah isu yang berbeza dari isu keempunyaan tanah. Dengan hormat, mereka telah terlepas pandang akan isu: isu pampasan adalah berkaitan tuan tanah, disebabkan penghuni-penghuni telah dibayar secara berasingan. Mendapati bahawa plaintif-plaintif berhak kepada pampasan bererti mengiktiraf hak keempunyaan Tan di sisi undang-undang jika tidak di sisi ekuiti, dan itu bermakna mengiktiraf bahawa "penjualan" telah menyerahkan kepentingan dalam tanah kepada pembeli. Mengatakan bahawa harta dalam tanah telah diserah walaupun penjualan tak sah dan tak boleh dikuatkuasakan adalah amat berlawanan dengan maksud dan tujuan penciptaan MCL dan tanah-tanah Rizab Melayu. Itu kesannya. Oleh yang demikian, soalan pertama harus dijawab secara afirmatif.

(4) Ordinan serta Enakmen-Enakmen Rizab Melayu adalah undang-undang yang dibuat dengan objektif tertentu. Kaedah-kaedah ekuiti (atau undang-undang common) tidak harus dipakai bagi mengalahkan objektif tersebut. Sementelah, jika ia bertujuan untuk mengesahkan transaksi yang sudahpun diisytihar sebagai tak sah oleh statut. Malangnya, kaedah-kaedah ekuiti sering kali digunapakai tanpa memperdulikan halangan-halangan yang dikenakan oleh statut (Akta Undang-Undang Sivil 1956). Bukan itu sahaja, malah, secara sedar ataupun tidak, pemakaian kaedah-kaedah juga telah dipanjangkan kepada keadaan-keadaan yang melangkaui keadaan-keadaan asal, sekaligus mencetuskan ketidakadilan yang lebih besar.

(5) Dalam kes ini, isunya bukan semata-mata yang mana lebih adil di antara memutuskan dengan berpihak kepada plaintif atau kepada defendan. Di sini, terdapat tindakan oleh dua orang yang menyalahi undang-undang bertulis dimana, jika dibenarkan, akan mengalahkan keseluruhan maksud undang-undang bertulis itu. Dalam keadaan sedemikian, kaedah-kaedah ekuiti tidak harus digunapakai. Malah, Mahkamah Rayuan agak keberatan menggunakan terma "propriety estoppel". Apa yang tinggal adalah tidak lebih dari beberapa kaedah kesaksamaan yang kabur. Sekali lagi, "kesaksamaan" di sini hanyalah di antara dua pihak yang berkontrak secara yang melanggar peruntukan undang-undang bertulis dan dengan memudaratkan satu kumpulan orang yang hendak dilindungi oleh undang-undang. Gambaran yang lebih besar tidak harus dilepas pandang. Memang benar bahawa mahkamah, melalui keputusan yang dibuat, akan cuba mencapai suatu keputusan yang "adil dan saksama". Tetapi ia hanya boleh berbuat demikian dalam ruang litup undang-undang, bukan melalui kaedah keadilan dan kesaksamaan yang umum dan kabur. Dalam kes ini, undang-undang yang melindungi keempunyaan orang Melayu terhadap kawasan-kawasan tertentu tanah telah digubal oleh badan perundangan sebagai suatu polisi dan ianya dipelihara oleh Perlembagaan. Jikapun ia perlu dipinda atau dimansuhkan, biarlah ia diputuskan, sebagai suatu perkara polisi, oleh badan perundangan, bukan oleh mahkamah melalui keputusan-keputusannya. Fakta bahawa tanah telah diambil oleh Kerajaan Negeri dan akan digunakan untuk maksud kediaman tidak memberikan apa-apa perbezaan. Tanah kekal sebagai Tanah Adat sehinggalah Kerajaan Negeri memutus

untuk mengisytiharkannya, atau sebahagian darinya, sebagai bukan Tanah Adat. Sekali lagi itu adalah perkara polisi. Oleh yang demikian, soalan kedua adalah dijawab secara negatif.

Case(s) referred to:
Devi v. Francis [1969] 2 MLJ 169 ***(refd)***
Foo Say Lee v. Ooi Heng Wai [1969] 1 MLJ 47 ***(dist)***
Goh Soon Leong v. Commissioner of Lands & Ors [1951] MLJ 201 ***(refd)***
Hj Hamid Ariffin v. Ahmad Mahmud [1976] 2 MLJ 79 ***(refd)***
Mistry Amar Singh v. Kulubya [1963] 3 All ER 499 ***(refd)***
Mustapha Osman v. Lee Chua & Anor [1996] 3 CLJ 494 CA ***(refd)***
Pang Cheng Lim v. Bong Kim Teck & Ors [1997] 4 CLJ 414 FC ***(foll)***
Ramsden v. Dyson [1866] LR 1 HL 129 ***(refd)***
Tinsley Milligan [1993] 3 All ER 65 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Kedah Malay Reservation Enactment (No 63), s. 6(2)
Kelantan Malay Reservation Enactment 1930, ss. 4, 6
Land Acquisition Act 1960, ss. 2, 8, 12
Malacca Lands Customary Rights Ordinance, ss. 3, 29
National Land Code (Penang and Malacca Titles) Act 1963, ss. 94, 104, 105(c), 108(1)(a)

Other source(s) referred to:
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia (Cases and Commentary)*, 2nd edn, p 639

For the appellant - Andrew Goh Tyau Soon (Khairil Aznan Azizi); M/s Andrew TS Goh & Khairil
For the respondent - Yau Jiok Hua; M/s Yau Jiok Hua & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Hamid Mohamad FCJ:

[1] A dispute arose regarding the entitlement to the sum of RM616,146 which was awarded as compensation for the acquisition by the State of a piece of land known as MCL 150 Lot 51 Mukim of Klebang Besar, Melaka (hereinafter referred to as "the said MCL land". The High Court gave judgment for the plaintiffs (the respondents herein). Appeal by the defendants (appellants herein) was dismissed by the Court of Appeal.

[2] This court, on 6 March 2006 granted leave to the appellants to appeal to this court on two questions:

(1) When land under Malacca Lands Customary Rights Ordinance (Cap. 125) ("the Ordinance") has been compulsorily acquired by the Government under the Land Acquisition Act 1960, does the prohibition in the Ordinance still apply to decide to whom the compensation shall be paid?; and

(2) Can the doctrine of fairness be used to override the principles of law and the Ordinance?

[3] We heard this appeal on 6 February 2007 and reserved our judgment. This is my judgment.

[4] The said MCL land was held under the Malacca Lands Customary Rights Ordinance (Cap. 125) ("the Ordinance"). Under the Ordinance, only a Malay domiciled in Malacca or a person holding a certificate from the Governor-in-Council of Malacca is qualified to hold an MCL land and no transfer of an MCL land "shall be valid unless it is made to an individual qualified to become customary land-holder."

[5] The registered owner of the MCL land is one Lee Chim Giang as the executor of the estate of Li Keng Liat, who died in 1903. Lee Chim Giang has also passed away. The present appellants are the current executors of the Estate of Li Keng Liat, deceased.

[6] In 1935, Tan Tai Tip, also since deceased, "purchased" the said MCL land from Lee Chim Giang who was then the executor of the Estate of Li Keng Liat. Tan Tai Tip, was not a Malay nor a person issued with a certificate by the Governor-in-Council to hold or to own the MCL land. In short, he was not a person qualified for an MCL land to be sold and transferred to. That explains why the land remained registered in the name of Lee Chim Giang, deceased. In this action the Estate of Tan Tai Tip, deceased, is represented by its administrators who are the respondents/plaintiffs.

[7] Without going into detail, I accept the finding of facts of the courts below which is very precisely stated by Abdul Aziz Mohamad JCA (as he then was) in the judgment of the Court of Appeal:

Since the sale, Tan Tai Tip and his relatives had been in quiet and uninterrupted possession of the land, had built dwellinghouses and lived on the land, had paid all quit rent and other dues, had been using the land for the planting of padi and vegetables and the rearing of cattle, and had been in possession of the document of title to the land. Although the land remained registered in the name of Lee Chim Giang as executor of the estate of Li Keng Liat, there was no claim to the land by any beneficiary of Li Keng Liat.

[8] By a proclamation dated 28 October 1981 in Form D under s. 8 of the Land Acquisition Act 1960, Pengarah Tanah dan Galian Melaka gave notice that the said MCL land was required for a public purpose, namely "kawasan perumahan". In 1982, an inquiry was held pursuant to s. 12 of the Act.

[9] By a notice in Form H pursuant to s. 16 of the Act dated 10 May 1982, the Collector of Land Revenue, Malacca made the following award by way of compensation in respect of the acquisition of the said MCL land:

1. Li Chim Giang Estate Of Li Keng Liat	Tuan Tanah	RM616,146.00
2. Tan Yed Lim	Tuan Rumah	RM28,200.00
3. Teo Seng	Peladang & sebuah rumah	RM55,100.00
4. Tan Ngiap Heng	Orang Pemelihara Lembu	RM338,730.00

[10] It is to be noted that the award contains four different compensations to be made to four different persons. They are, first, to "Tuan Tanah" (the land owner). The second compensation is paid to Tan Yed Lim. He had erected "a temporary building" on the said property, paying a nominal rent to Tan Tai Tip, deceased. The third person to whom compensation was paid was Teo Seng. He had rented about five acres of the said property from Tan Tai Tip for planting padi and vegetables. He also occupied about half an acre of the said property on which he built "a semi-permanent" house, paying a nominal rent to Tan Tai Tip, deceased. The fourth person to whom compensation was also paid was Tan Ngiap Heng, the son of Tan Tai Tip, deceased and the 2nd plaintiff in the suit. All these facts are to be found in the plaintiff's (respondent's) statement of claim.

A The compensations made to them must be in their capacity as "person interested" within the meaning of s. 2 of the Land Acquisition Act 1960.

[11] However, the only dispute in this appeal concerns the award
B made to "tuan tanah".

[12] So, the issue really is: who is the "tuan tanah"? The occupants have been compensated separately. So, the fact that the learned High Court Judge, having allowed the respondents to
C rest their case on exclusive possession instead of on the (alternative) ground that even if the sale was illegal and void, Tan Tai Tip's estate was entitled to compensation because the contract of sale had been fully executed, but did not decide on it, makes no difference. The compensation in question is for "tuan tanah"
D not for the occupiers who have been paid separately. With respect both the High Court and the Court of Appeal appear to have missed this point.

[13] Perhaps, at this stage, I should state the grounds on which the courts below made their respective decisions.

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[14] The High Court, in a lengthy judgment, having made findings on a number of issues eg, s. 3 of the Ordinance allows conditional sale, the sale was not illegal or invalid at its initial stage "and had not reached the periphery of illegality" and that the illegality, even
F if there was, "does not bar any property being passed under an illegal and unenforceable contract," went on to decide that "a bare trust could not have been created owing to the non transfer of the property by valid instruments." On that ground he would have dismissed the respondents' claim. But, he did not stop there. He
G went further to apply the concept of equity and proprietary estoppel and relying, *inter alia*, on the speech of Lord Kingsdown in *Ramsden v. Dyson* [1866] LR 1 HL 129, decided in favour of the respondents.

H **[15]** The Court of Appeal was of the view that the learned High Court Judge "was entitled to resort to any appropriate principle of law to do justice", even though the court was hesitant "to label it as considerations of proprietary estoppel." In short, the court's decision was based on what is perceived as fair and just.

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[16] The respondents' claim is premised on the assertion that Tan Tai Tip, deceased had "purchased" the said land from Lee Chim Giang, one of the sons of Li Keng Liat, deceased – see para. 4 of the statement of claim.

[17] Evidence was led to that effect. The learned High Court Judge was "convinced that the land was sold to Tan Tai Tip by the registered owner sometime in 1935 *albeit* an oral agreement." However, the learned judge went on to say:

> Of course if the Plaintiffs fail to prove the sale and purchase of the said property, or even proved but declared null and void, the defendants would be in a better position though not necessarily the recipient of the compensation money …

[18] The learned judge then went on to consider the provisions of ss. 3 and 29 of the Ordinance. He concluded that s. 3 does not automatically make a sale of a Malacca Customary Land to a non-Malay a void transaction but it merely becomes a conditional sale until validated in accordance with the provisions of the Ordinance. He then made a finding that there was "no evidence which leads to the conclusion that an outright sale did take place." He then considered the Court of Appeal judgment in *Mustapha bin Osman v. Lee Chua & Anor* [1996] 3 CLJ 494 and concluded that even if the contract was illegal, it did "not bar any property being passed under an illegal and unenforceable contract."

[19] The Court of Appeal was silent on the points decided by the High Court that I had just mentioned. However, in justifying the learned High Court Judge's "resort to any appropriate principle of law to do justice" the Court of Appeal did say:

> This is a case of an outright sale of land …

[20] So the issue whether there was a valid sale, the effects of ss. 3 and 29 of the Ordinance and whether property passes even under an illegal and unenforceable contract in this case are issues that I shall have to deal with.

[21] I have no difficulty accepting that there was a sale. But the question is whether it is valid or void.

[22] Section 3 of the Ordinance provides:

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(1) No transfer of customary land shall be valid unless it is made to an individual qualified to become a customary land-holder.

(2) The following persons shall be deemed to be qualified to become customary land-holders:

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a. any Malay domiciled in the State of Malacca; and

b. any person holding a certificate from the Governor in Council of Malacca that he is qualified to hold customary land.

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[23] Section 29 provides:

29. No mortgage or sale of any interest in any customary land in Malacca shall be valid unless made in accordance with this Ordinance.

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[24] The issue had in fact been decided by the Supreme Court in *Pang Cheng Lim v. Bong Kim Teck & Ors.* [1997] 4 CLJ 414. Delivering the judgment of the court, Wan Adnan Ismail FCJ (as he then was) said:

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We agree with the contention of the learned counsel for the plaintiff that as the said lands were subject to the said Ordinance the alleged purchase of the same by the first defendant's mother was not valid as she had not obtained any certificate from the Governor-in-Council under section 3(2) of the Ordinance. She was not qualified to become a customary land-holder under section 3(1) of the Ordinance. She was therefore not competent to acquire any title at all to the said lands.

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[25] It was also argued by learned counsel for the defendant/respondent in that case that the defendant's/respondent's mother had obtained title to the said lands by adverse possession. The court held, at p. 432 of the law report:

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If she could not acquire any title under the Ordinance, there could not be any other way by which she could acquire it. To allow her to acquire title by any other method not in accordance with the Ordinance would defeat the purpose of the Ordinance. The Ordinance was enacted for the protection of certain classes of people.

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[26] The judgment referred to the Privy Council judgment in *Mistry Amar Singh v. Kulubya* [1963] 3 All ER 499 and quoted a large portion of the judgment with approval.

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[27] At p. 434, the court further held: A

> We do not agree with the learned defence counsel's further contention that the plaintiff's title to the said lands had been extinguished and the said lands had reverted to the State. The plaintiff's mother was the customary land-holder of the said land. The plaintiff became the registered proprietor of the said lands under the National Land Code through the distribution proceedings under the 1955 Act which we had found to have been properly held. The fact that the said lands had been occupied by the defendants for a length of time did not extinguish the plaintiff's title to the said lands. B C

[28] It is also to be noted that in that case the Supreme Court considered the provisions of s. 3 of the Ordinance as well as the provisions of ss. 104, 105(c) and 108(1)(a) of the National Land Code (Penang And Malacca Titles) Act 1963 ("1963 Act"). D

[29] A few points arising from that case are worth noting. First, the lands (MCL lands) were previously registered in the plaintiff's mother's name. The court held that since she was not a Malay she "must have been issued with a certificate under s. 104 (of the 1963 Act – added) in respect of the said lands. Otherwise she would not have been registered as proprietor of the said lands. She was a "certificated person" under the 1963 Act in respect of the said lands. She was a customary land holder. Her position is similar to Lee Chim Giang in the instant appeal, except that Lee Chim Giang was registered as an executor, which in my view does not make any difference legally. They are both registered proprietors, one as a customary land holder and the other as an executor. The pertinent point is that, the alleged purchase by the defendant's mother in that case who was neither a Malay nor a certificated person was held to be invalid. In my view, similarly in the instant appeal, the alleged purchase by Tan Tai Tip (also not a Malay and not a certificated person) must, on the same ground, be held to be invalid. E F G

[30] It is unfortunate that this case was not referred to by both the High Court and the Court of Appeal in their respective judgments. H

[31] Cases on Malay reserve lands are also to the same effect. The position is summarized by Teo Keang Sood and Khaw Lake Tee in their book *Land Law in Malaysia (Cases and Commentary)*, 2nd edn beginning at p. 639 as follows: I

> The Malay Reservations Enactments of the respective Malay States seek to secure to the Malays their interest in land …
>
> Any dealing, disposal or **attempt to deal in or dispose of** Malay reserve land in contravention of the Enactments of the respective States are rendered null and void under the respective Enactments. Furthermore, no action for breach of contract shall lie in respect of any such dealing, disposal or attempt and no rent or money paid or valuable handed over is recoverable in court. (emphasis added)

[32] The authors cited numerous authorities to support their statements, which I do not intend to go into.

[33] Then, at p. 642, the learned authors made similar statements with regard to the Malacca customary land. In fact they paraphrased the provisions of the 1963 Act, in particular ss. 94 and 108.

[34] In this respect, I shall only refer to some of the judgments of this court and the former Supreme Court.

[35] In *Haji Hamid bin Ariffin v. Ahmad bin Mahmud* [1976] 2 MLJ 79 (FC), one Mahmud bin Samad, a Malay and a registered proprietor of Malay Reservation land sold the land to a Siamese lady. Subsequently, the Siamese lady who had since died also sold the land to the plaintiffs who are Malays. The land remained registered in Mahmud's name, who had since died. The plaintiffs as administrators of the Siamese lady's estate sued the administrator of Mahmud's estate for specific performance. The issue in the Federal Court was whether the first sale by Mahmud to the Siamese lady was void. The court held that by virtue of s. 6(2) of the Kedah Malay Reservation Enactment (No. 63) the purported sale was void ab initio and it could not be enforced by the purchase nor could the purported purchase pass a good title to another even if he be a Malay. Section 6 of the Kedah Malay Reservation Enactment (No. 63), considered by the court, reads as follows:

> 6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest,

whether by transfer, sale in execution of a decree, sale at the instance of a charge or otherwise, in any person who is not either a Malay or a Siamese.

(2) Any document or agreement purporting to vest in any other person any right or interest contrary to the provisions of sub-section (1) shall be void.

[36] It is to be noted that the Federal Court, in arriving at the decision, disagreed with an earlier judgment of the former Court of Appeal in *Goh Soon Leong v. Commissioner of Lands & Ors.* [1951] MLJ 201 in so far as the earlier case had decided that a transfer of a Malay Reservation land to a non-Malay is not absolutely prohibited or necessarily void *ab initio.*

[37] I agree with the Federal Court on that point.

[38] The Federal Court also distinguished *Foo Say Lee v. Ooi Heng Wai* [1969] 1 MLJ 47 (FC) since in that case the agreement was conditional and expressed to be subject to the State Authority allowing the land to be excised under s. 4 of the Kelantan Malay Reservation Enactment 1930 or agreeing to declare the Siamese lady a Malay for the purposes of the Enactment under s. 19, since such an agreement does not purport to vest in a non-Malay right or interest in Malay Reservation land and, therefore, is not contrary to the provisions of subsection (1) of s. 6 of the Enactment.

[39] In the instant appeal, the alleged sale happened in 1935. "Purchase price" was paid, possession was given. Both parties had long died. No attempt whatsoever was made for Tan Tai Tip to be issued with a certificate of the Governor-in-Council. In the circumstance, I am unable to see how the learned trial judge could hold the sale to be conditional. On this point, the Court of Appeal is right when it says categorically:

This is a case of an outright sale …

[40] So, just like *Haji Hamid bin Ariffin & Anor (supra)*, this case is distinguishable from *Foo Say Lee (supra)*. So, it is not necessary to consider whether the provisions of s. 3 of the Ordinance allows a conditional sale. However, at a right time, serious thought should be given to the issue, because, knowing what is happening on the ground, the Malacca Customary Land, as well as the Malay Reserve Lands may be no more than a beautiful but empty

A package while the contents are enjoyed by people who are prohibited by law to own. The registered proprietor will be left with the liability to pay quit rent, and may be, in tort as the land owner.

B **[41]** This is more so when, as the learned High Court Judge had done, he applied the principle in *Tinsley Milligan* [1993] 3 All ER 65 which was followed by the Court of Appeal in *Mustapha bin Osman v. Lee Chua & Anor* [1996] 3 CLJ 494 "that property in chattels and land can pass under an illegal and therefore C unenforceable contract." That in my view, will certainly defeat the whole purpose of the creation of MCL lands and Malay Reserve lands. This, in fact, would be another method of giving effect to a transaction clearly prohibited by law, the very thing this court had warned against in *Pang Cheng Lim (supra)*. I shall say more on this D when dealing with the second question.

[42] The learned trial judge clearly said so and the Court of Appeal appears to support the view that the right to compensation is a different issue altogether from the issue of ownership of the E land.

[43] That, as I have said with respect, is missing the issue: the compensation in issue is for the "tuan tanah", the occupiers having been paid, separately.

F **[44]** I am also of the view that it is wrong to think that this is a one-off case concerning payment of compensation money and that it has no implication on Malay Reserve lands as a whole.

[45] The compensation in question is for "tuan tanah". The basis G of the claim by the plaintiffs is that Tan Tai Tip had purchased the land. The plaintiffs cannot extricate themselves from the alleged purchase as the reason that gives them the right to the land which is now represented by the compensation money. To hold that the plaintiffs are entitled to the compensation is to H recognize Tan Tai Tip's ownership right, if not in law, in equity, which in turn means recognizing the "sale" as having passed the interest in the land to a purchaser. To say that property passes even if the sale is invalid and unenforceable is to defeat completely the purpose of the creation of MCL and Malay Reserve Lands. I That is the effect.

[46] In the circumstance, I would answer the first question in the affirmative.

2nd Question

[47] The learned trial judge applied the principle of proprietary estoppel, though not pleaded, to decide in favour of the respondents. He also quoted a passage from the speech of Lord Kingsdown in *Ramsden v. Dyson (supra)* in support of his view. He also referred, *inter alia*, to s. 3(1) of the Civil Law Act 1956 and the case of *Devi v. Francis* [1969] 2 MLJ 169 on the applicability of the rules of equity in Malaysia.

[48] The Court of Appeal, though reluctant to use the term "equitable estoppel", approved the learned High Court Judge's "resort to any appropriate principle of law to do justice even if the principle had not been considered in submission."

[49] That gives rise to the second question: Can the doctrine of fairness be used to override the principles of law and the Ordinance?

[50] The first point I would like to stress on the provision of s. 3(1) of the Civil Law Act 1956 is the restriction imposed by it on the applicability of the English rules of equity. In this respect, I shall focus more on the two conditions, the first to be found in the opening words of the subsection itself and, the second, in the proviso which was omitted by the learned trial judge when he quoted the section in his judgment.

[51] The opening words of s. 3(1) reads: "Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia …" What it means is that before applying any English rules of equity (as administered on 7 April 1956 in West Malaysia), we must first ascertain whether there is in existence any written law in Malaysia that it may contravene in a particular case. Even if there is no such law, its application is still subject to the proviso:

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[52] The Ordinance and the Malay Reserve Enactments are laws made with a definite objective. No rules of equity (or common law) should be applied that would defeat such objective. Whatmore when the effect is to give effect to a transaction declared to be invalid by the statute.

[53] Unfortunately, quite often, we find that equitable rules have been applied without considering the restrictions imposed by statute (Civil Law Act 1956). Not only that, the application of the rules have, consciously or unconsciously, been extended to situations beyond the original or earlier situations, which even leads to greater injustice.

[54] Take for example, the case of *Ramsden v. Dyson (supra)*. First, the passage from the judgment of Lord Kingsdown is part of the dissenting judgment. Secondly, it should be read in the light of the facts of the case. As the case is 140 years old and many will find it difficult to get hold of the law report, I shall reproduce the summary of the facts as found in the head-note of The Weekly Reporter Vol. XIV at p. 926:

> In 1844 J.T. wished to build a house, & c., upon a piece of land then belonging to Sir J.R., the grandfather of the appellant, in fee. The land was allotted to him, and a certain ground-rent was agreed upon, but no lease or agreement for a lease was executed, according to a usage which prevailed in the R. estates, by which persons, without having leases granted to them, but upon an understanding that leases for sixty years, renewable every twenty years, would be granted to such persons whenever they should require such leases, were allowed to build on the said estates. Relying on this usage, and the assurances and promises of the duly authorized agents of the R. estates that, he could have such lease whenever he pleased, and that so long as he paid his ground-rent he was as safe without a lease as with one, as he would never be disturbed in his possession, J. T., under the superintendence of these agents, expended large sums of money in erecting buildings on the land allotted to him, and continued to pay the annual ground-rent, as agreed upon.

[55] So, even if we were to prefer the dissenting judgment, it must be read in the light of the facts. Note, in particular, the existence of the usage in relation to that particular estate, the assurance and promises of the duly authorized agents of the estate.

[56] For the purpose of this case, I shall say no more on it. In a proper case, may be we should take a close look at "the trend" that has taken place in this country, taking into account the provisions of our written law and local practice especially among the rural people in this country and local circumstances.

[57] The pertinent point to note is that, unlike in *Ramsden v. Dyson (supra)* or other cases, in this case, it is not just the issue of which is more fair to decide in favour of the plaintiffs or the defendants. Here, we are dealing with an illegal act by both of them, the result of which not only will cause one of them to suffer losses. We are dealing with the act of two persons that contravenes the written law and which, if given effect to, will defeat the whole purpose of the written law. Should we apply some rules of equity in such a situation? My answer is in the negative.

[58] In fact, the Court of Appeal was reluctant to use the term "proprietary estoppel." What is left is nothing more than some vague rules of fairness. Here again, first, the "fairness" is only as between the two parties who contracted contrary to the provisions of the written law and to the detriment of the class of people that the law seeks to protect. The bigger picture must not be missed.

[59] It is true that the courts, through its decisions try to arrive at a "fair and just" result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. The building may be called "The Palace of Justice", but the courts it houses are the courts of law.

[60] The British, having colonized "Tanah Melayu" (as Peninsular Malaysia was then known in the Malay language) leading to the influx of immigrants (this is a historical fact), saw it necessary to make laws to protect the ownership of the Malays over some areas of land. The law was enacted by legislature as a matter of policy. It is preserved by the Constitution. If at all it should be repealed or amended, let it be decided, as a matter of policy, by the legislature, not the court through its decision.

[61] The fact that the land has been acquired by the State and will be used for residential purposes makes no difference. The land remains a Customary Land until the State authority decides to declare it, or part of it, otherwise. That again is a matter of policy.

A **[62]** In the circumstances, I would answer the second question in the negative.

[63] I would allow the appeal with costs and order that the deposit be refunded to the appellants.

B **[64]** My learned brothers YA Dato' Arifin Zakaria and YA Dato' Augustine Paul FCJs have read this judgment and agreed with it.

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